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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CALIMON,

Defendant and Appellant.

B241750

(Los Angeles County  
Super. Ct. No. NA090840)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Laura L. Laesecke, Judge. Affirmed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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After a jury trial, defendant and appellant Michael Calimon was convicted of one count of violation of Penal Code section 211, robbery. In a bifurcated proceeding, the court found true the allegations that appellant had suffered four prior convictions within the meaning of the "Three Strikes" law (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), one prior serious felony conviction within the meaning of section 667, subdivision (a), and had served one prior prison term within the meaning of section 667.5, subdivision (b).

The trial court struck three of the four Three Strikes convictions and sentenced appellant to a total of 16 years in state prison. We appointed counsel to represent him on appeal.

After examination of the record, counsel filed an opening brief which contained an acknowledgment that he had been unable to find any arguable issues. We, and counsel, advised appellant that he could submit a supplemental brief in his own behalf.

Appellant has submitted such a brief. We consider each of his contentions, and, finding no error, affirm.

### Facts

The crime occurred on November 26, 2011. On that date, a cashier at Joe's Liquor in Long Beach saw appellant put two cans of beer into his pocket. The cashier told him to take them out. Appellant ran out of the store and got into the driver's side of a white car. When the cashier approached the car, appellant said, "back up. I got the gun." The passenger then reached into his waistband. The cashier was frightened. He went back into the store and recorded the license plate of the car. Appellant was apprehended and identified.

The cashier also testified that about two weeks earlier, he saw appellant in the store. Appellant picked up a bottle of liquor and tried to put it in his jacket, but the cashier told him to put it back, and took the bottle from his hand. Appellant said, "this is my hood. You have to watch out," then left the store.

## Discussion

Appellant first contends that the court did not respond to his request for a *Marsden* hearing. (*People v. Marsden* (1970) 2 Cal.3d 118.) When appellant made the request, after the jury verdict, but before the trial on the priors, the court held a hearing. We have reviewed the transcript of that hearing, and find no abuse of discretion in the ruling. (*People v. Earp* (1999) 20 Cal.4th 826, 876.)

Appellant next contends that the evidence concerning the incident two weeks before the crime should not have been admitted. Defense counsel unsuccessfully sought to have this evidence excluded. We see no abuse of discretion (*People v. Rogers* (2006) 39 Cal.4th 826, 862) in the court's decision to admit this evidence, which showed both intent and common plan or scheme. (Evid. Code, § 1101, subd. (b).)

Nor do we find grounds for reversal in appellant's ineffective assistance of counsel claims. He finds ineffective assistance of counsel in that counsel did not present the 911 tape to the jury, did not call the passenger in the car, did not "put [appellant] on the stand," and did not obtain the store's video.

Appellant has not demonstrated that the representation fell below an objective standard of reasonableness under prevailing professional norms or that there is a reasonable probability that, but for the matters of which he now complains, the outcome would have been different. (*People v. Mincey* (1992) 2 Cal.4th 408, 449.)

As to the video, the evidence was that both a police detective and the defense investigator inquired of the store owner concerning the video, and were told that the events at issue here were not recorded because the system was not functioning. As to the fact that appellant did not testify, we note that after defense counsel informed the court that appellant did not wish to testify, the court personally informed appellant that he had the right to testify. The court asked appellant, "is it your choice not to testify today?" Appellant answered, "yes."

As to the contentions concerning failure to present the 911 tape or call the passenger as a witness, counsel could have had many legitimate reasons for those tactical decisions.

Finally, appellant contends that one of his prior convictions was the result of a plea he entered into before the Three Strikes law was enacted, and for that reason the conviction should not have been considered in this case. This is a contention that the Three Strikes law is a prohibited ex post facto law, a contention which has been rejected by the California Supreme Court. (*People v. Helms* (1997) 15 Cal.4th 608, 614–616.)

#### Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.